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Supreme Court, U.S.
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No. 04-629

IN THE

Supreme Court of the United States

PETE K. RAHN, Director, Missouri Department of Transportation, *et al.*,

Petitioners,

v.

THOMAS ROBB, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over this case when all of the issues presented for review are questions of fact, not questions of law.

2. Whether the First Amendment allows Missouri to deny participation in its Adopt-A-Highway program to an organization because the viewpoint of said organization might cause an adverse reaction from the public.

3. Whether the First Amendment allows Missouri to deny participation in its Adopt-A-Highway program to an organization based on its desire to avoid being perceived as having an association with said organization.

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STATEMENT OF THE CASE

Missouri's Adopt-A-Highway program requires the participants in the program to pick up litter on Missouri state highways. Mo. Code Regs., tit. 7 § 10-14.040(2). *Petitioner's Appendix*, (A-56). In exchange for these voluntarily performed services, Missouri agrees to erect a sign identifying the participants in the program at each end of the adopted segment of highway. Mo. Code Regs., tit. 7 § 10-14.050. (A-61).

Missouri adopted a regulation establishing eligibility requirements for participation in the Adopt-A-Highway program. Mo. Code Regs., tit. 7 § 10-14.030(2). (A-53). This regulation authorizes Missouri to reject applications from organizations for whom state or federal courts have taken judicial notice of a history of violence or that deny membership in the organizations on the basis of race, color or national origin. Mo. Code Regs., tit. 7 § 10-14.030(2)(C) & (D). (A-54).

On April 19, 2001, Ralph Griffith applied for application in the Adopt-A-Highway program on behalf of the Knights of the Ku Klux Klan, Realm of Missouri, Unit 188. (A-6). On May 18, 2001, Petitioner rejected said application on the basis that Respondent denied membership in its organization based on race, and on the basis that federal courts have taken judicial notice of a history of violence by the Ku Klux Klan. (A-6-8).

The District Court invalidated Missouri's action rejecting Respondent's participation based on its membership requirements on collateral estoppel grounds, the identical issue having been conclusively decided against the State in

Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000). (A-16). It further invalidated Missouri's action rejecting Respondent's participation based on judicial notice of a history of violence by the Ku Klux Klan because the regulation, as applied to the Klan, is not reasonable in light of the purpose of the Adopt-A-Highway program, which is to reduce litter along the highways and beautify Missouri's roadsides. (A-27).

The Eighth Circuit affirmed the District Court's ruling barring the relitigation of the issue of discriminatory membership requirements on collateral estoppel and *stare decisis* grounds. (A-36). It also affirmed the District Court's ruling that the regulation rejecting Respondent's participation based on an alleged history of violence was invalid as applied to Respondent, because Petitioner had produced no plausible evidence that Respondent had a history of violence. (A-37-39).

After determining that there was no factual basis for Petitioner's actions, the Eighth Circuit found, as an alternate theory for affirming the District Court's ruling, that the regulation was overbroad (A-41-42), that the State may not suppress expression because of a possible hostile reaction from the public (A-42), and that the Adopt-A-Highway program is primarily speech on the part of the participants that may not be suppressed because of any co-mingled State speech. (A-45-46).

REASONS FOR DENYING THE PETITION

1. THIS CASE WAS DECIDED AS A MATTER OF FACT, NOT LAW, AND IS THEREFORE NOT REVIEWABLE BY THIS COURT

Petitioner's brief hinges on the issue of whether their Adopt-A-Highway signs constitute speech by the State or speech by the participants. However, in this case, the identity of the speaker is irrelevant. The resolution of the case did not depend on whether the regulations were constitutional, but rather whether on the specific fact-based issue of whether Petitioner's actions were justified based upon the evidence in the case. Such a fact-based determination does not present a constitutional issue reviewable by this Court.

In its opinion, the Eighth Circuit held that it was not necessary to address the issue of whether the Adopt-A-Highway program constituted State speech or speech by the petitioners, since the State had failed utterly to produce any evidence that an unbiased application of its regulations would permit Respondents' exclusion from the program. The Court found that the State's contention that courts have taken judicial notice that Unit 188 has a history of violence, and were therefore not eligible for participation in the program pursuant to its regulations,

> rings hollow because the State has not shown that the regulation, by its own terms, applies to Unit 188. The regulation itself is vague and the limits of its exclusion are unclear, but the State has failed to make any legitimate showing that Unit 188

> violates its requirements, and this leads us to find that the State is using the regulation as a smokescreen.

Robb v. Hungerbeeler, 370 F.3d 735, 740 (8th Cir. 2004).

The Eighth Circuit's fact-based determination does not present a constitutional issue reviewable by this Court. U.S. Supreme Ct. R. 10; *Weeth v. New England Mortgage Co.*, 106 U.S. 605, 606, 1 S. Ct. 91, 92, 27 L. Ed. 99 (1882).

2. THE FIRST AMENDMENT DOES NOT PERMIT THE STATE TO SUPPRESS SPEECH BASED ON A HECKLER'S VETO

Petitioner's contention that the Eighth Circuit's Heckler's Veto law differentiates from that of this Court is incorrect. "Listener's reaction to speech is not a content-neutral basis for regulation. Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-5, 112 S. Ct. 2395, 2403-4, 120 L. Ed. 2d 101 (1992). (*Citing Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988), *Murdock v. Pennsylvania*, 319 U.S. 105, 116, 63 S. Ct. 870, 87 L. Ed. 2d 1292 (1943), and *Schneider v. State*, 308 U.S. 147, 162, 60 S. Ct. 146, 84 L. Ed. 2d 155 (1939)). *See also Terminiello v. Chicago*, 337 U.S. 1, 69 S. Ct. 894; 93 L. Ed. 1131 (1949).

Petitioner's citation of *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) is inapposite, since the holding of the Fifth Circuit may not overrule the law of this Court. It is also distinguishable, since a Texas group calling

itself "Ku Klux Klan" was found by the Court to be attempting to use the Texas Adopt-A-Highway program to intimidate a specific desegregated housing project in direct violation of an injunction, and therefore upheld the decision of Texas to reject the Klan's application. *Id.* at 1080.

3. THERE IS NO CONFLICT IN THE CIRCUITS AS TO WHETHER THE ADOPT-A-HIGHWAY PROGRAM CONSTITUTES STATE SPEECH

Participation in the Adopt-A-Highway program is the participant's speech, not that of the Petitioner. Petitioner argues that the signs commemorating participation in the program that it erects pursuant to Mo. Code Regs., tit. 7 § 10-14.050 constitute the only speech involved in this case, and that said signs are a species of "thank you" signs. Petitioners miss the point of the previous decisions on this issue that the actual act of participating in the program that constitutes speech in this case. Participants in the program pick up litter from the sides of state highways. Mo. Code Regs., tit. 7 § 10-14.040(J)-(Q). (A-58). By so doing, participants in the program express "their solidarity with the community and their wish to become known as promoters of clean highways" and doers of good works for the community. *Robb v. Hungerbeeler*, 370 F.3d 735, 745 (8th Cir. 2004). The signs merely inform passers-by of the identity of the participants, it does not constitute the entirety of the speech involved in this case.

The Eighth Circuit made a fact-based determination that allowing Respondent to participate in the Adopt-A-Highway program had no impact on State speech. It found that "the editorial discretion exercised by the State in running the AAH program is minimal: there is scant creativity involved in

producing the signs identifying the program participants, and **the underlying purpose of the program is unrelated to the dissemination of governmental messages**." *Id.* at 745. (Emphasis added). This fact-based determination does not present a constitutional issue reviewable by this Court pursuant to U.S. Supreme Ct. R. 10.

Petitioner's contention that there is a dispute between the Circuits as to whether participation in an Adopt-A-Highway program constitutes speech on the part of the participants or the State is patently incorrect. Every case that has ruled upon that issue has determined that it is the participant that speaks in an Adopt-A-Highway program. *Robb v. Hungerbeeler*, 370 F.3d 735, 745 (8th Cir. 2004); *Cuffley v. Mickes*, 208 F.3d 702 n.3 (8th Cir. 2000); *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075, 1078 (5th Cir. 1995); *Knights of the Ku Klux Klan v. Arkansas St. Hwy. and Trans. Dept.*, 807 F. Supp. 1427, 1435 (W.D. Ark. 1992). None of Petitioner's cases involve Adopt-A-Highway programs. Instead, they involve circumstances in which the government has collected funds to promote their own policies, which is quite different from this case, in which the State has sought out volunteers to provide free labor to assist the State in performing one of its duties, in return for a sign recognizing that service. When there are many cases on point, all of which agree that participation in the Adopt-A-Highway program is speech by the participant, not the State, Petitioner may not create an illusory "split between the circuits" by reference to programs that are not remotely similar to the Adopt-A-Highway cases.

CONCLUSION

For all the foregoing reasons, Petitioner's Petition for Certiorari should be denied.

Respectfully submitted,

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